Massachusetts Steps Up:
Key Sexual and Domestic Violence Issues for College Administrators
Alcohol, Consent, and Accountability

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General Policy Considerations

- VAWA – Prevention and Education Policy
  - Each part of your policy should address this mission
  - Preponderance of the evidence
- A student-friendly policy which encourages reporting
  - One point of contact or many? Board or Investigation
- The investigation is to focus on a suspected violation of your policy, not a criminal investigation:
  - Gender-Based Harassment, NOT rape (although, may be both)
- Your policy can address issues the law does not:
  - Consent, threats, reasonable person, etc.
- Additional violations:
  - "Amnesty" for all regarding AOD violations
  - What about other "violations"
- Retaliation:
  - Say what you mean and mean what you say

Different Methods to Address

- Student Conduct Process:
  - 2 Investigations – initial fact finding and then the hearing
  - Multiple conversations with multiple people
  - 60 days to investigate
  - Board members
    - Students?
    - Insurance, civil suits
  - Training
  - Bias and claims of bias
  - Appeal
- Investigative Process:
  - OCR investigates using this method
  - So does HR
  - Increased reporting?
  - Who are investigators
    - On-campus resources
    - Consultants
  - Who reviews the report
    - 1 person or board
    - Authority
  - Appeal?

Investigations

- No party has an additional burden
- This is not Law and Order
- There are no "gotcha" moments
- Questions are asked for fact finding, not to satisfy curiosity
- "Your cross doesn't have to be cross"
- Watch for biases and address appropriately

Questions to Ask During Investigation

- Was there sexual behavior?
- Was it unwelcomed?
  - Consent
  - Force
    - Physical
    - Threats – does your policy cover all threats or just imminent bodily harm
    - Coercion
  - Incapacitation
    - Would the reasonable person know incapacitated

Consent

- **Consent** is an understandable exchange of affirmative words or actions, which indicate a willingness to participate in mutually agreed upon sexual activity. Consent must be informed, freely and actively given. It is the responsibility of the initiator to obtain clear and affirmative responses at each stage of sexual involvement. Consent to one form of sexual activity does not imply consent to other forms of sexual activity. The lack of a negative response is not consent. An individual who is incapacitated by alcohol and/or other drugs both voluntarily or involuntarily consumed may not give consent. Past consent of sexual activity does not imply ongoing future consent.

Incapacitation

- **Incapacitation** is a state where someone cannot make rational, reasonable decisions because s/he lacks the capacity to give knowing consent (e.g. to understand the "who, what, when, where, why, or how" of their sexual interaction).
  - Sexual activity with someone who one should know to be, or based on circumstances should reasonably have known to be, mentally or physically incapacitated (by alcohol or drug use, unconsciousness or blackout), constitutes a violation of *The Student Code*.
  - A person whose incapacity results from mental disability, sleep, involuntary physical restraint, or from the consumption of rape drugs cannot give consent.
  - Alcohol related incapacity results from a level of alcohol ingestion that is more severe than impairment, being under the influence, drunkenness or intoxication. Evidence of incapacity may be detected from context clues, such as:
    - Slurred speech
    - Bloodshot eyes
    - The smell of alcohol on their breath
    - Shaky equilibrium
    - Vomiting
    - Unusual behavior
    - Unconsciousness
  - Context clues are important in helping to determine incapacitation. These signs alone do not necessarily indicate incapacitation.

Incapacitation – Who is the Reasonable Person?

- *Commonwealth v. Mountry*, 463 Mass. 80, 90-92 (2012)
  - The *Lopez* court recognized, however, that in situations where the prosecution is not required to prove the use of force beyond that necessary for penetration, the possibility of a defendant's reasonable mistake about the complainant's consent could increase, creating the potential for injustice if no instruction concerning the defendant's honest and reasonable belief as to the complainant's consent were given.
  - "The Commonwealth had to prove what '*the defendant* reasonably should have known' (emphasis added), not what the average reasonable unintoxicated person would have known. A defendant's impaired state of mind is relevant to the jury's determination of this element."

Amnesty

- To all students involved?
- At times, students are hesitant to report the occurrence of a gender-based assault to University officials because they are concerned that they themselves, or witnesses to the misconduct, may be charged with violations of the alcohol or drug policy. While these behaviors are not condoned by the University, the importance of dealing with them pales in comparison to the need to address instances of alleged gender-based misconduct. Accordingly, in these cases, the University will not typically pursue disciplinary action against a student who claims, in good faith, to be the victim of a gender-based misconduct in connection with the reporting of a gender-based incident, or against students named as witnesses to the incident.

Retaliation

- The University encourages students to report all incidents of gender-based misconduct. Any retaliation against a person for filing a complaint, or against witnesses for providing a statement during an investigation, or other attempts to prevent the reporting of an incident of gender-based misconduct is a violation of *The Student Code* and will result in disciplinary actions and/or sanctions.

Questions